STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE RAYMOND MARSH, JR., Charging Party, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2024-E PERB Decision No. 1461 September 18, 2001

Appearances: George Raymond Marsh, Jr., on his own behalf; Girard & Vinson by Allen R. Vinson, Attorney, for Sacramento City Unified School District.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by George Raymond Marsh, Jr., (Marsh) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Sacramento City Unified School District (District) violated the Educational Employment Relations Act (EERA).[1] The charge does not specify which section(s) of EERA the District violated.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge and attachments, the warning and dismissal letters, Marsh's appeal and the District's opposition. The Board finds the Board agent's dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

[1] EERA is codified at Government Code section 3540 et seq.

ORDER

The unfair practice charge in Case No. SA-CE-2024-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

April 30, 2001

Mr. George R. Marsh Jr.
4010 Adelheid Way
Sacramento, California 95821

Re: George Raymond Marsh, Jr. v. Sacramento City Unified School District
Unfair Practice Charge No. SA-CE-2024-E
DISMISSAL LETTER

Dear Mr. Marsh,

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 27, 2001. As Charging Party, you allege that the Sacramento City Unified School District violated the Educational Employment Relations Act (EERA).[1] As stated in my April 18, 2001 letter the original charge did not specify which section(s) of EERA the District allegedly violated.

I indicated to you in my attached letter dated April 18, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to April 27, 2001, the charge would be dismissed.

I received the amended charge on April 27, 2001.

Facts

The amended charge contained the following information.

The District has engaged in a continuing course of conduct of attempting to conceal hazardous working conditions from staff, students and parents with regards to firearms on school campus. On or about May 2000, you asked the District to provide safe working conditions and establish a policy "whereby staff and students are informed when firearms are found on campus." The District has failed to do so.

The District has violated Article 2, the safety conditions provision, of the collective bargaining agreement.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The amended charge states:

> The district has engaged in a course of conduct in violation of these laws by pursuing a policy of concealment from staff and students of the presence of firearms on campus and the presence of ammunition to fire them, from the incident on or about March 2000 to the present.

Also, the amended charge states:

> In retaliation for participating in union activities and using union representation to file grievances, the district took punitive action against me including, but not limited to, reassigning my teaching to a classroom 1/3 the size of my classroom prior to engaging in union activities.

Discussion

The amended charge fails to establish a prima facie violation of EERA.

First, as stated in the letter of April 18th, the March 2000 incident falls outside of PERB's six month statute of limitations.[2]

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

As Charging Party you have not met the burden of demonstrating that the amended charge is timely filed within PERB's six month statute of limitations.

Second, you assert that you were given a classroom 1/3 the size of the room you used prior to engaging in union activities.

As stated in the April 18th letter to demonstrate a violation of EERA section 3543.5(a). the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or

[2] Although not contained in the original charge, a reference to the March 2000 incident was supplied in supplemental information. Therefore it was addressed in the April 18th letter.

threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

You do not demonstrate any connection between the District's transferring you to a smaller classroom and the filing of the grievance.

Third, EERA section 3541.5(b) states:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

In the amended charge, you specifically allege the District failed to comply with Article 2 of the collective bargaining agreement. However, you fail to present facts demonstrating a unfair practice under the EERA. Therefore the Board has no authority to enforce Article 2 of the collective bargaining agreement.

Finally, even if you do establish a prima facie violation of EERA, it is likely deferrable to arbitration as discussed in the April 18, 2001 warning letter.

Therefore, I am dismissing the charge based on the facts and reasons contained above and in my April 18th letter.

Right to Appeal

Pursuant to PERB Regulations[3], you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Marie A. Nakamura
Board Agent

Attachment

cc: Allen R. Vinson

MAN

April 18, 2001

Mr. George R. Marsh Jr.
4010 Adelheid Way
Sacramento, California 95821

Re: George Raymond Marsh, Jr. v. Sacramento City Unified School District
Unfair Practice Charge No. SA-CE-2024-E
WARNING LETTER

Dear Mr. Marsh,

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 27, 2001. As Charging Party, you allege that the Sacramento City Unified School District violated the Educational Employment Relations Act (EERA).[1] The charge does not specify which section(s) of EERA the District violated.

Facts

You have been a Special Day Class teacher at Will C. Wood Middle School in Sacramento since 1995.

In the Fall of 1998, prior to the November election you attended a mandatory staff meeting at which a video advocating support of the Democratic Party was shown. After the video you explained to those in attendance that it was unlawful for the District to require employees to view the video. After the meeting you assert that Vice Principal Richard Markwell has been "markedly unfriendly" towards you.

In addition to the information contained in your charge, you provide ninety pages of additional background information, some of which demonstrates the nature of your relationship with the administration. In May 1999, Mr. Markwell denied you the opportunity to have a student teacher assigned to your classroom. In October 1999, a student that allegedly damaged your personal radio was not reprimanded by the administration. In March 2000, when a student was found on campus with a sawed-off rifle the administration failed to inform staff, parents and students that although the gun was not loaded, ammunition was found in the sock of the student.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On March 20, 2000, Mr. Markwell came to your classroom and instructed you not to send any more students to the Vice Principal's office for fighting unless it involved "blood and guts." When this conversation began you stated that you would like a union representative to be present. Mr. Markwell replied, "no, we are not going to do that." You did not think Mr. Markwell's comments regarding "blood and guts" were in accordance with the collective bargaining agreement. Therefore, you discussed the conversation with Principal Pequeno and provided her as well as the Sacramento City Teachers Association (SCTA) documentation of the meeting.

On March 28, 2000 you met with Mr. Markwell, Ms. Pequeno, and Larry Hopper, a union representative to discuss Mr. Markwell's "blood and guts" comment. The comment was never discussed. Instead the meeting focused upon how you treat fights in the classroom. During the meeting you were told by Mr. Markwell and Ms. Pequeno that when a fight occurs in your classroom you do not have to document every fight and send the students to the Vice-Principal's office.

On March 30, 2000, you received a performance evaluation with an overall rating of "satisfactory." However, for the category of "Develops and implements individual program plans in terms of the child's ability and handicap in relation to the curriculum" you received a rating of "needs improvement." You assert that you received the "needs improvement" rating because you did not create Positive Behavior Plans for certain students as directed by Mr. Markwell. Very few Special Education Teachers in the District understand how to create Positive Behavior Plans and very few do create them. In July you filed a grievance which asserts that this evaluation was not on the proper form. You did not specifically grieve the "needs improvement" rating.

On April 26, 2000, you attempted to break up a fight. While you were trying to break up the fight a student yelled, "let them fight." He then pushed you. For pushing you the student was suspended for only one day. After the incident you filled out "referrals" for the students involved. That same day Mr. Markwell came to your classroom and presented you with a reprimand for using "referrals" and not "incident reports" to document the fight. A copy of the reprimand was placed in your personnel file.

Because of the reprimand of April 26, 2000 and the evaluation of March 2000, you filed a grievance on July 12, 2000. The grievance states that the District violated section 6.1.8, 10.2 and 10.8 of the contract. Under the section of the grievance form that requires the specific details of the grievance it states "[e]valuation not on proper form" and "[r]eprimand based on unvalidated and inaccurate information and based on filing of a form not required of any other teacher." The Level I meeting did not occur until November 15, 2000. Prior the Level 1 meeting no one from the SCTA met with you to discuss your grievance and you were not allowed to present your side of the grievance during the Level 1 meeting. Manuel Villarreal, SCTA Director told you, that the Level 1 meeting's purpose was not to hear the Grievant's argument. You assert that Mr. Villarreal was incorrect because the contract section 4.3.6 provides in part:

Conduct of the Level I Meeting:

a. The intent of the meeting is to focus on a solution to the specific allegation(s), issue(s) or problem(s). The parties shall attempt to define the issue, discuss interests, explore options, and if possible, agree to an outcome;

As a result of the Level I meeting the Administration and SCTA suggested the following as a draft compromise to your grievance:

1. The letter of reprimand shall be sealed and removed at a time certain (January 26, the end of the first semester of the school year 2000-2001) provided there are no future occurrences of a similar nature.

2. The evaluation form was changed to the correct form and Mr. Marsh had been shown the evaluation on the appropriate form before the deadline to file teacher evaluation for the Sacramento City Unified School District, therefore, this has become a moot point and the evaluation will stand as is.

You rejected this compromise. In January 2001 and on February 1, 2001, SCTA afforded you the opportunity to proceed to Level II and or to address your concerns to the SCTA Board.

At the beginning of school year 2000-2001 you were reassigned to a room one-third the size of your old room. A teacher with less seniority received your larger room.

You provided extensive documentation to Superintendent James Sweeney and also called his office. He has not responded.

In addition, in the charge you provide the following contract provisions with short parenthetical comments as evidence of the District's violation of the contract:

4.2.4 Grievance will be waived if not presented within 30 days after occurrence. (I informed the Union of many matters in violation of the contract, they failed to assist me in filing a grievance.)

4.2.6 Time allowances can be extended by mutual consent. (I agreed to no such extensions.)

4.2.8 Reprisals may not be taken for filing a grievance. (I was given a classroom 1/3 the size of my prior classroom, without my consent or consultation. I was given a room smaller than other teachers with less seniority.)

4.2.14 The grievant may request the presence of a representative at any meeting. (Mr. Markwell, Vice Principal of Will C. Wood Middle School, refused to allow me to have a union representative present when he was giving me verbal instructions not to send students out unless it involved "blood and guts". At another meeting, Ms. Nancy Pequeno, Principal of Will C. Wood Middle School, refused to allow a union representative to accompany me to a meeting during the school day. She suggested it be held after school on a day that was a minimum day in which she knew teachers left early.)

4.3.1 The parties should try to work out the grievance informally, without the necessity of filing a grievance. (This was never attempted by Ms. Pequeno.)

4.3.2 (a) A meeting with the parties should attempt to focus on a solution, define the issues, discuss interests, explore options,...(this never occurred)

4.3.3 If a grievance has been filed, the meeting should be held within 10 days after the grievance was filed (this did not happen)

4.3.6 The level 1 meeting should focus on a solution to the specific allegations, issues, or problems. The parties should attempt to define the issue, discuss interests, explore options, and, if possible, agree to an outcome. (the meeting did none of these things).

6.1.5 "Be conducted cooperatively with the employee accepting responsibility for self evaluation and having full knowledge of any administrative evaluation". (completion of Positive Behavior Plans is not understood by teachers as having anything to do with ratings on a performance evaluation. To my understanding, the completion or failure to complete Positive Behavior Plans, has never been used as a factor in teacher evaluations for any other teacher in the district. It is not listed in any of the literature as a factor in assessing the teacher's performance.)

6.2.3.1 The District's evaluation process shall contribute to high staff morale. (The requirements regarding Positive Behavior Plans is not well-understood by many teachers, and has not been well-articulated by district administrative staff.)

6.2.3.1 "Other data which may be included in evaluation shall be mutually agreed to in writing by the evaluator and the evalutee." (Positive Behavior Plans had not been agreed to)

6.6 "District level committees shall be formed on an ad hoc basis to serve as the final authority for resolving disagreements between the evaluator and the evaluatee which may arise over the appropriateness of the evaluation criteria and / or ratings of less than "satisfactory". (this committee was never brought to my attention by the union)

7.8 "Special Education specialist teachers, nurses, or elementary preparation teachers affected by any decision made regarding realignment of the relationships of schools or classes in terms of hours or location, shall be given the opportunity to submit a request regarding their new assignment. Within the restriction of program needs, seniority shall be the primary consideration for assignments." (My classroom was changed without my consultation to a room 1/3 the size of my former room. Teachers with less seniority were given preference on rooms.)

10.2 "Derogatory material which comes to the attention of the administration and which might be placed in the employees personnel file shall not be placed in the file until after the administration has made every effort to validate subject material. If such material is to be placed in the file, it shall be presented to the employee no later than (30) thirty days from the administration's awareness of the act, provided such act took place within the preceding twelve (12) months. Validation will include consulting with the employee." (No only has the administration not made "every effort to validate", they have made no effort.)

10.2.2.1 The purging from the employee's personnel file of all material which is erroneous and invalidated. (They have refused to remove such material.)

10.8 Derogatory material, unfounded, should be removed from the employee's file. (The district and the school site administrators have refused to do this.)

11.1 "A Teacher may use reasonable force, as is necessary, to protect himself, herself from attack, to protect another person or

property, to quell a disturbance threatening physical injury to others, or to obtain possession of weapons or other dangerous objects upon the person or within control of a student."
(I was told in writing by the SCTA President, Tom Rogers, not to break up fights under any circumstances. I was told by the school Vice Principals, Richard Markwell and Mary DeSplinter, not to block doorways, even in cases in which a student expressed his intentions to leave the classroom in order to physically fight another student. I was told by the VP, Richard Markwell not to send students to the office unless a fight was "blood and guts".)

11.2 "Administrators will assist teachers who have been or are being assaulted while acting in the discharge of their duties". (Administrators have given no assistance.)

11.3 When teachers are attacked, the administrator will call the police. (The administrators are not doing this.)

11.7 "The Board shall reimburse employees for any damage or destruction of clothing or other items of personal property brought in and removed each day while on duty in the school, on the school premises, or at a school-sponsored activity as per District policy." (The administration has failed to hold the students accountable for damaging property, or to inform the teachers that they can be reimbursed.)

11.12 "A collection of the Pertinent discipline codes delineating the rights and duties of all teachers with respect to student discipline shall be presented to each teacher and made available to each parent annually." (There are significant contradictions, both written and oral, regarding what is expected of teachers in discipline matters at the school. There is as well significant contradictions between stated policy and actual practice.)

11.13.1 "Each building principal shall establish a chain of command to supervise in his/her absence". (There was not acting principal for most of the fall, 2000 at the school)

11.4 "Teachers shall not be required to work under unsafe or hazardous conditions, or to perform tasks which endanger their health, safety, or well-being". (The administrators at the school site are not keeping the parents and students and teachers fully informed about incidents involving weapons on or near school property.)

Discussion

This charge against the District fails to establish a prima facie violation of EERA. First, much of conduct you cite as an unfair practice by the District falls outside of PERB's six month statute of limitations. Second, as Charging Party, you do not meet the burden of showing the "who, what, when, where and how" of an unfair practice. Third, even where the conduct might be timely, you do not meet the standards of a "discrimination" violation under EERA. Fourth, any conduct that might establish a timely unfair practice is most likely deferrable to arbitration. Finally, PERB does not have authority to enforce the collective bargaining agreement.

First, EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

You filed this charge on February 27, 2001. Thus to constitute an unfair practice within the six month statute of limitations, the underlying conduct must have occurred after August 26, 2000. Therefore the references you make in the additional information to Mr. Markwell's denying you the opportunity to have a student teacher in May 1999, the student that damaged your personal radio and was not reprimanded by the administration in October 1999, and the March 2000 incident of the student with the gun and ammunition on campus are all outside of the six month statute of limitation. Also, the incident where Mr. Markwell came to your class room and told you not to send students to the Vice Principal's office unless it is "blood and guts" and the subsequent meeting of March 28, 2000 are also outside of the six month statute of limitations.

PERB considers the limitations period to be tolled during the time it took the charging party to exhaust any contractual grievance machinery through settlement or binding arbitration. EERA section 3541.5(a)(2) provides in part, "[t]he board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery." Thus, the statute of limitations begins to run once the charging party knows or should have known, of the conduct underlying the charge. The statute of limitations is then tolled once a grievance is filed, but only to the conduct contained in the grievance. The statute of limitations begins to run again once the grievance process is completed.

Therefore the only portion of your charge that arguably falls within the six month statute of limitations is the conduct about which you filed the July 12, 2000 grievance, the evaluation of March 2000 on the improper form and the April 26, 2000 reprimand. Under EERA section 3541.5(a)(2) the statute is tolled from the time you filed the grievance until you exhaust the grievance machinery of the collective bargaining agreement. For the March 30, 2000

performance evaluation on the wrong form, the statute of limitations ran from the time you knew of the wrong form until July 12, 2000, approximately three and a half months. For the April 26, 2000 reprimand, the statute of limitations ran from the time you received the reprimand until July 12, 2000, approximately two and a half months. You filed this charge on February 27, 2001. According to the February 1, 2001 letter from SCTA you still had the option to proceed to Level II and had not exhausted the grievance procedure. Thus it appears that the two allegations are timely within the six month statute of limitations.

Second, PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Your charge does not provide the requisite "how" of an unfair practice. Your charge establishes the "who" and "where," the administration of Will C. Wood and the additional information provided establishes the "when," the March 2000 performance evaluation and the April 2000 reprimand," of the unfair practice. However, the charge does not establish "how" the conduct of Mr. Markwell and Ms. Pequeno violated EERA. PERB recognizes a limited number of unfair practices under EERA and the conduct you cite does not establish any of them.

Third, it is most likely that you are asserting that the District violated EERA by committing the unfair practice of discriminating against you because of your exercise of protected conduct under EERA section 3543.5(a).

In order to demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the

employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

If you are asserting that the District through Mr. Markwell and Ms. Pequeno discriminated against you because of your exercise of protected rights, you have not established such a prima facie violation. Although you exercised rights under EERA when you filed the grievance of July 12, 2000, the only adverse action you demonstrate subsequent to the grievance is the transfer to a classroom one-third the size of your previous room. However, you do not show any connection between the District's transferring you to the smaller room and the filing of the grievance in July of 2000.

Fourth, even if you were able to establish that the District discriminated against you because of your exercise of protected rights, such a dispute may be deferrable under the contract to arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5)[2] (Regulation 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

The contract between SCTA and the District provides for binding arbitration. Therefore, if you are asserting that the District discriminated against you because of your exercise of grievance rights, that conduct is prohibited under the contract Article 4, section 4.2.8 which states, "[n]o reprisals of any kind shall be taken by or against any participant in the grievance procedure by reason of such participation." Thus, under Lake Elsinore the grievance machinery of the agreement between the District and SCTA covers the alleged discrimination at issue and culminates in binding arbitration. Also, the conduct complained of in this charge is prohibited by Article 4, section 4.2.8 of the agreement. Therefore if you are asserting that the District discriminated against you because of your exercise of protected rights, the charge must be deferred to arbitration.

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies of the Regulations may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95814-4174, and the text is available at www.perb.ca.gov.

Finally, EERA section 3541.5(b) states:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

In the instant charge, you specifically allege the Sacramento City School District failed to comply with many provisions of the collective bargaining agreement. However, as stated above you fail to present facts demonstrating an unfair practice under the EERA. Therefore the Board has no authority to enforce the sections of the agreement that you assert that the District violated.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before Friday, April 27, 2001, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marie A. Nakamura
Board Agent

MAN